UNITED NATIONS
ECONOMIC AND SOCIAL COUNCIL

Distr.:
LIMITED

E/ECA/UNCTC/26
18 February 1983

Original : ENGLISH

UNITED NATIONS
CENTRE ON TRANSNATIONAL CORPORATIONS

ECONOMIC COMMISSION FOR AFRICA

Second African Regional Meeting on a Code of Conduct on Transnational Corporations

Addis Ababa, 31 January - 3 February 1983

LC/NAIROBI

REPORT OF THE SECOND AFRICAN REGIONAL MEETING ON A CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

A. ORGANISATION AND ATTENDANCE

1. The second African Regional Meeting on a Code of Conduct on Transnational Corporations was held in Addis Ababa, Ethiopia, from 31 January to 3 February 1983. The meeting was opened by Mr. Marc Manirakiza, Deputy Executive Secretary of the United Nations Economic Commission for Africa (ECA). A statement on behalf of Mr. Sidney Dell, Executive Director of the United Nations Centre on Transnatonal Corporations (UNCTC) was delivered by Mr. Sylvanus Tiewul, Special Assistant to the Executive Director and Chief of the Administrative Unit, UNCTC.

2. The Meeting was convened jointly by the United Nations Centre on Transnational Corporations (UNCTC) and the Joint ECA/UNCTC Unit on Transnational Corporations, in pursuance of Economic and Social Council resolution 1982/68 of October 1982 which decided that a special session of the Commission on Transnational Corporations, open to all States, should be convened to complete the task of formulating a code of conduct and requested the UNCTC to provide all necessary information on the status of the negotiations particularly to States that had so far not participated in those negotiations.

3. The purpose of the meeting was to brief African countries on the progress so far achieved in the negotiations on a code of conduct on transnational corporations and on the outstanding issues still to be resolved. Such briefing would enable the African countries to prepare themselves adequately in order to participate effectively in the forthcoming negotiations on the code.

4. The meeting was attended by representatives of the following State Members of the Economic Commission for Africa : Algeria, Angola, Benin, Burundi, the Congo, Djibouti, Egypt, the Gambia, Ghana, Guinea, the Ivory Coast, Kenya, Morocco, the Niger, Nigeria, Rwanda, Senegal, the Sudan, the United Republic of Cameroon Zambia and Zimbabwe. The Organization of African Unity (OAU) was also represented at the meeting.

5. The meeting elected Mr. Georges Tanwo (United Republic of Cameroon) as its Chairman, Mr. Marcus T. Mhlanga (Zambia) as first Vice-Chairman, Mr. Latyr Kamara (Senegal) as second Vice-Chairman and Mr. Ahmed Aboul-Kheir (Egypt) as Rapporteur.

B. AGENDA

6. The meeting adopted the following agenda :

1. Opening of the meeting
2. Election of officers
3. Adoption of the agenda and organization of work
4. General review of negotiations on a code of conduct
5. Summary of the progress towards a code of conduct
6. Outstanding issues related to the code of conduct
7. Any other business
8. Adoption of the conclusions and report of the meeting
9. Closure of the meeting

C. ACCOUNT OF PROCEEDINGS

Opening addresses

7. In his opening statement, Mr. Marc Manirakiza, Deputy Executive Secretary of the ECA, emphasized the importance of the Regional Meeting on a Code of Conduct on Transnational Corporations. He referred to the protracted negotiations which has been taking place over the past five years under the aegis of the Commission on Transnational Corporations and stressed that the principal concern expressed by African countries at the present point was that the activities of transnational corporations should be basically compatible with the economic and social objectives of the host countries.

8. Considering the predominant role which transnational corporations continued to play in African economies, he stressed the need to examine issues relating to activities of transnational corporations which should aim at carefully appraising the draft code so as to derive maximum benefit from the presence of transnational corporations while at the same time minimizing their adverse effects.

9. Speaking on behalf of Mr. Sidney Dell, Executive Director of the United Nations Centre on Transnational Corporations, Mr. Sylvanus Tiewul stated that the main purpose of calling the meeting was to brief African Governments on the negotiations of a Code of Conduct on Transnational Corporations so as to ensure full and adequate participation of the African countries. The special session of the commission would, for the first time, be open to all States Members of the

United Nations. The special session would be held in two parts, namely in March and May 1983, with a view to finalizing the draft code. He took the opportunity to express the gratitude of UNCTC to Mr. Sten Niklasson, Under-Secretary of State for Industry in Sweden, who had kindly agreed to give the meeting the benefit of his experience in the negotiations on the draft Code.

General review of negotiations on a code of conduct (item 4)

10. In introducing the item, the Chairman referred to the concerns expressed by African countries at the first regional meeting in 1977 and within the Group of 77 as well as the prescriptions contained in the Lagos Plan of Action. The meeting should consider to what extent those concerns had been taken care of during the drafting of the Code.

11. Mr. Sten Niklasson, who had been Chairman of the Working Group on the Code throughout the negotiations, made an analysis of the underlying motivations and the legislative basis of the Code. Emphasizing that he was speaking in his personal capacity, he noted that no State could claim jurisdiction over the whole of a TNC, only over that part of the corporation operating in its own territory. Since TNCs pursued activities beyond the legal and political powers of individual States, national rules regarding TNCs must be supplemented by international standards, set by the international community.

12. Noting that foreign investment and TNCs might play a very significant role in the process of industrialization and economic growth, not least in developing countries, he recalled that another basic reason for the Code was to contribute to ensuring more stable and trustful relations among States and TNCs and to creating conditions for increased flows of international investment.

13. He stressed that those reasons for the Code of Conduct had become ever stronger in a gradually declining world economy and that they were equally valid for all countries, whether developed or developing, whether home or host countries. If the communality of interest was ignored there was a risk that the Governments negotiating the Code would freeze into the rigid positions of the traditional North-South and East-West conflicts.

14. Clarifying the legal aspects of the Code, Mr. Niklasson drew attention to the difficulties in making an international instrument directly applicable to TNCs legally enforceable. In particular he pointed out that many provisions of the Code contained principles that did not lend themselves easily to normal regulatory language. In addition, enforcement of the Code would have to be arranged at the international level, which would require States to yield a degree of national sovereignty to international bodies.

15. Mr. Niklasson strongly underlined, however, that the purely legal qualities of the Code did not exclusively determine its effectiveness and drew the attention to the importance of a strong implementation mechanism.

16. He went on to explain the relevance of references in the draft Code to national and international law. Noting that it might be not only desirable but necessary to employ international law as a supplementary instrument to ensure that the activities of TNCs were brought in line with national goals, he explained that international law, of which the Code was an embryo, helped to avoid the risk that TNCs might make the sovereign powers of States illusory. While developing countries might be reluctant to accept commitments to international law mainly established by developed countries, their caution in that respect should not lead to rejecting references to international law altogether.

17. Finally, Mr. Niklasson recalled the decision of the Economic and Social that the Code should be universally adopted and concluded that a Code acceptable to all States required a balanced approach based on reason and imagination. That called for concessions by all concerned even though that might imply deviations from historic positions. One representative queried whether the draft code contained provision which called upon countries to harmonize their positions vis-à-vis TNCs, as the latter generally played one developing country against another to obtain the best terms for themselves.

18. In the discussions on the procedure to be followed to achieve the objectives of the meeting, the secretariat emphasized that delegations were not expected to take a position on specific issues. In that regard, a large number of important issues had already been agreed upon in the draft code. The objective of the meeting was therefore essentially to appraise the African countries of the stages reached in the negotiations on a Code of Conduct and the outstanding issues which still had to be resolved.

19. It was further pointed out that the special session of the Commission on Transnational Corporations to be held in March and May 1983 would concentrate on those areas where there were substantial differences remaining between the negotiating parties. The meeting was therefore exhorted to consider essentially those issues to strengthen the negotiating capacity of African delegations at the special session. The meeting also felt that it would be useful to consider the position paper of the Group of 77 in looking at the outstanding issues to ensure that the African position was harmonized with those contained in that paper. If there were any issues which conflicted with that position, then the attention of the Group of 77 would be drawn to such issues to ensure that the concerns of the African countries were taken fully into account.

20. Referring to the general questions raised earlier on the negotiations on the Code of Conduct, Mr. Niklasson replied that TNCs did not participate in the negotiations. However, they were represented within the group of experts advising the Intergovernmental Working Group as well as in the nongovernmental organisation such as the International Chamber of Commerce (ICC) and the International Organization of Employers (ICE), which participated as observers. He further mentioned that it was not true to say that the TNCs were opposed to a Code of Conduct. A number of important international business organizations had expressed their support of the Code, mainly because they regarded the Code as an instrument for devising basic rules of the game and establishing more confident investment relations.

21. The Code once approved was intended to be endorsed by Governments while TNCs were not expected to be signatories to it. As to the question of whether the draft code contained any specific provisions to prevent TNCs playing one country against another to obtain the most favourable terms of investment for themselves, the reply was that it did not, at least in specific terms. However, paragraph 17 of the Code entitled "Interference in intergovernmental relations" might be relevant in that respect.

22. In answer to a query about the legal nature of the Code, the representative of UNCTC replied that the Group of 77 favoured a mandatory code on the grounds that they wanted it to be an effective instrument. On the other hand, the developed countries preferred a non-binding agreement which would provide flexibility like the OECD guidelines. No definitive decision had been taken on those issues, and possibilities that the Code could be a mixture of both binding and non-binding rules had also been discussed. He also drew attention to the danger of insisting on obtaining a mandatory code in the sense that it could very well remain a dead letter, like so many of the other instruments, conventions and treaties drawn up under the aegis of the United Nations which had not been ratified by a large number of Member States precisely because they were mandatory. He did not think that the code should suffer the same fate.

23. There were alternative ways to ensure the effectiveness of the Code. A detailed procedure for implementation and monitoring with specific provisions to that effect contained in the Code could make it effective. Provision could also be made for a machinery for review and application of the Code to which any party could address itself. Annual or periodic assessment of the implementation measures could be made by the review body and changes brought about as had been done in the case of the OECD guidelines when clarifications were needed in light of actual situations.

Summary of progress towards a Code of Conduct (item 5)

24. Under that item of the agenda, various delegations requested a progress report from the secretariat on the extent to which the recommendations of their first meeting on the Code in 1977 had been taken into account during the negotiations.

25. In reply, a member of the secretariat stated that the issues raised at the 1977 meeting had been fully taken into account in the work of the Intergovernmental Working Group on the code. They were also the basis for discussions whthin the African Group and the Group of 77 in their preparations for the negotiations on the Code. All the recommendations had been followed very closely and were reflected in the various parts of the draft Code.

26. Reviewing the progress made in drafting the Code, the representative of UNCTC retraced the origin of the idea of establishing a Code of Conduct on TNCs. A complaint brought by a member country to the United Nations General Assembly against a TNC had led to the appointment of a Group of Eminent Persons to recommend ways of monitoring the activities of TNCs given their wide impact on economic processes in the world. That had led to the creation, through the Economic and Social Council, of the Commission on Transnational Corporations, one of whose main task was to prepare a draft Code of Conduct. An Intergovernmental Working Group had been set up to undertake that task, through various stages of consultations with Governments and regional groups, and an outline of proposals for the Code had been drawn up and subsequently enlarged through inputs from the various interested groups.

27. The draft Code, the text of which was found in document E/C.10/1982/6, consisted of six parts. The first part was the preamble and the objectives on which no draft text was available in view of the fact that its formulation presupposed the finalization of the substantive parts of the Code. The preamble and objectives would fall into place once the major, outstanding issues were resolved. At the present time, that first part was only in the form of the Chairman's formulations and Group of 77 proposals.

28. The other parts contained formulations where the drafting had been completed. About two thirds of those positions had been agreed. In areas where disagreement existed, alternative formulations were contained within brackets to reflect the different views expressed. The draft presented by the Group of 77 was the result of some three years of negotiations within the Group and reflected a general consensus among participants. Many areas of the Group of 77's text agreed with the final formulations in the draft code. Others, particularly in areas where no final agreement had been reached in the draft Code, were not intended to be rigid and could be changed in order to arrive at a compromise situation.

29. Substantial progress had been made during the negotiations. The agreed provisions included such important issues as adherence to socio-cultural objectives and values, ownership and control, balance of payments, consumer and environmental protection, disclosure of information, intergovernmental co-operation and implementation of the Code.

30. In their assessment of the results achieved during the negotiations some delegations felt that certain issues were covered rather inadequately in the draft Code. The provisions relating to the transfer of technology, the role of TNCs in import and export activities and transfer pricing had received scant treatment in the text. The secretariat however explained that a number of those issues were dealt with in instruments adopted by other United Nations bodies such as ILO or separate instruments such as the principles and rules for the control of restrictive business practices, or were being negotiated, such as the Code of Conduct on the Transfer of Technology. Those agreements were incorporated in the Code through cross-references.

31. In the negotiations on the Code, some delegations in the Working Group wanted the basic principles of those agreements to be incorporated in the text, while other delegations thought that merely formal cross-references to them would be adequate. On transfer pricing, which was a major issue, agreement was reached to refer to the arm's length principle. The agreed provisions on disclosure of information were also relevant in that respect.

Outstanding issues related to the Code (item 6)

32. In introducing the item, a representative of UNCTC stated that, in spite of the extensive agreement reached on the Code, a number of fundamental issues remained unresolved. Central among them were the legal nature of the Code, the preamble and objectives of the Code, the definition of the term "transnational corporation", non-collaboration by transnational corporations with the racist minority regime of South Africa, and some aspects of the treatment of transnational corporations.

33. Attention had already been drawn to the fate of certain mandatory instruments and treaties adopted under the auspices of the United Nations. To that extent, it was thought possible that the parties insisting on having a binding code might adopt a cautious approach and accept some compromise formula on those issues which would ensure that the concern of the developing countries to make the Code effective were taken into account.

34. Concerning the preamble and objectives of the Code, the UNCTC representative explained that two sets of formulation by the Chairman of the Working Party and the Group of 77 were available and would form the basis of drafting, once the outstanding issues of substance had been resolved.

35. Most of the difficulties that existed on the provisions concerning the activities of transnational corporations were not considered to be insurmountable. Some delegations were reserving their final positions on some of the provisions in that chapter pending the outcome of the negotiations on other parts of the Code. There was substantial divergence of views on the provisions on national sovereignty and non-interference in the internal political affairs of host countries.

36. The chapter on the definition of transnational corporations and coverage of the Code was one which raised fundamental issues and could lead to a serious impasse unless a great deal of political will was forthcoming from the various parties involved. The contention was seen as existing essentially between East and West rather than North versus South as the Socialist countries of Eastern Europe were unwilling to equate their national enterprises with transnational corporations on the grounds that the Code was to be confined to capitalist private enterprises.

37. With reference to the definition, one delegation raised the question about the status of companies set up during colonial and in post-colonial periods by foreign firms. It was explained that they would all fall within the category of transnational corporations if they met the definition.

38. The provision on non-collaboration with the racist minority regime of South Africa contained in paragraph 14 of the draft Code also remained to be resolved. The developed countries had proposed a text which would call upon TNCs operating in southern Africa to contribute to the elimination of apartheid and racial discrimination in the area; that text would also call upon TNCs to respect national laws adopted in pursuance of Security Council decisions regarding southern Africa. In contrast, the African countries, supported by the Group of 77 as a whole, had proposed a provision which would call upon TNCs progressively to reduce their investments in South Africa and to terminate all activities in Namibia; furthermore, the provision would call on TNCs to cease collaboration with the racist minority regime in South Africa. On that issue, a great deal of negotiation still had to be undertaken to bring the opposing sides together. The African delegations felt very strongly that their original positions put forward in 1977 were to be stressed with the Group of 77, to avoid any relenting by the Group in future negotiations. The secretariat informed the meeting on that score that the Group of 77 had adopted the African position in full.

39. One delegation wanted to know whether the Code contained provisions regarding the salaries paid by TNCs. The ILO Tripartite Declaration was stated to contain a number of paragraphs relating to salaries and the Code included a cross-reference to the Declaration. Reference was also made to the Sullivan Principle adopted by the United States, relating to the activities of TNCs in South Africa. That principle was considered to have been too little and had come too late to influence TNCs in any positive way. EEC had also adopted certain rules in that respect for the OECD countries, which were equally ineffectual.

40. In reply to a general question on the purpose of the meeting, the secretariat mentioned that a similar meeting had been held in Bangkok to brief ESCAP countries. Furthermore, similar meetings were planned for the ECLA and ECWA regions. Those meetings were being held in response to an Economic and Social Council resolution to ensure that the developing countries were fully briefed before participating in the special session of the Commission on the Code to be held in March and May 1983.

41. The meeting received information on the remaining outstanding issues in the part of the draft code relating to the treatment of transnational corporations and the implementation of the Code. The first item contained three aspects relating to general treatment, nationalization and compensation and jurisdiction. All those included contentious issues such as the reference to fair, equitable and non-discriminatory treatment as well as national treatment, the terms for determining the compensation in cases of nationalization and a number of complicated legal problems in the area of jurisdiction. As to the chapter on implementation, it was noted that general agreement existed on most provisions. In that respect, it was noted that the Code did not provide for a complaints procedure, i.e. no judgements were expected to be passed on the conduct of individual companies.

42. In reply to a question concerning the next step before the adoption of the Code by the General Assembly, the representative of UNCTC stated that a great deal depended on the outcome of the special session in March and May 1983 and the political will of the participating countries to pursue the negotiations with a view to reaching a consensus. Some half dozen hard core problems remained to be resolved. While the view had been put forward that the provisions on which agreement had been reached could constitute the first part of the Code, with negotiations to continue on the remaining issues, it was generally agreed that that approach would not be feasible. The general feeling now was that all the provisions should be agreed upon, or nothing at all.

Adoption of the report and conclusions of the meeting (item 8)

43. Following its deliberations, taking into account the concerns of African countries contained in the report of the first African Regional Meeting held in 1977 at Addis Ababa and the relevant provisions of the draft Code of Conduct submitted by Venezuela on behalf of the Group of 77, the Meeting took note of the information provided on progress in the preparation of the Code and made the following recommendations :

(a) The African Group should continue to help the Group of 77 so as to ensure that in future negotiations on pending questions, account would be taken of all the concerns of African countries as expressed in the report of the first African Regional Meeting in 1977;

(b) The African Group should take the necessary steps to ensure that its position that the Code should be binding should prevail in the negotiations on the legal nature of the Code;

(c) As relations between transnational corporations and South Africa were vital to Africa, the relevant provision should be clearly expressed to take into account the African position so as to ensure that transnational corporations were called upon to cease their investments in South Africa and progressively wind up existing activities and operations;

(d) African States should take an active part in the forthcoming meetings in March and May 1983 on the preparation of the Code and manifest the greatest possible political will to bring the negotiations on the Code to a successful conclusion;

(e) The code of conduct, when completed, should serve as an important instrument in strengthening the position of African Governments in their dealing with transnational co-operations and the negotiations should therefore be accelerated in order to bring the work to a speedy conclusion;

(f) ECA and OAU, in collaboration with the United Nations Centre on Transnational Corporations, should organize similar periodic meetings on progress in the preparation of the code so as to increase awareness of it among African Governments with a view to ensuring that it was adopted as widely as possible and implemented as effectively as possible.

44. The meeting adopted the report on its deliberations.

Closure of the meeting (item 9)

45. After the customary exchange of courtesies, the Chairman declared the Meeting closed.